

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOSE MANUEL ARMENTA**

Claimant

VS.

**ALEX R. MASSON, INC.**

Respondent

AND

**FLORIST MUTUAL INS. CO.**

Insurance Carrier

Docket Nos. 1,032,311 &  
1,032,312

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent), as well as claimant, requested review of the January 16, 2008, preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. C. Albert Herdoiza, of Kansas City, Kansas, appeared for claimant. Mark E. Kolich, of Lenexa, Kansas, appeared for respondent and its insurance carrier.

The January 15, 2008, preliminary hearing in this matter was based upon a previous preliminary Order entered by the Administrative Law Judge (ALJ) on July 18, 2007. That Order was appealed to the Board on the single issue of whether claimant provided respondent with a timely written claim for compensation. This Board Member's Order filed October 11, 2007, noted that the ALJ, in his July 18, 2007, Order, did not

. . . make any findings concerning claimant's date or dates of accident, whether claimant suffered a series of accidents or just a single traumatic injury, whether claimant's right knee injury was a natural consequence of the left knee injury or the result of a separate accident or series of accidents, whether claimant's right knee

injury arose out of and in the course of his employment with respondent, and whether claimant suffered any intervening accidents or injuries to either knee.<sup>1</sup>

This Board Member's Order went on to find that claimant had never been disabused of his belief by either respondent or its insurance carrier that Dr. Kenneth Wertzberger continued to be his treating physician. Therefore, claimant's written claim for compensation was within one year of the last authorized medical treatment and was timely made.

The ALJ, in his Order of January 16, 2008, found that claimant sustained a compensable single accident on August 14, 2002, but suffered no series of accidents thereafter. The ALJ also found that claimant injured his left knee as a result of the August 14, 2002, accident, and that claimant's right knee injury is a natural consequence of his original injury. The ALJ noted that respondent stipulated to notice of a left knee injury in 2002 but denied timely written claim. The ALJ also appointed Dr. Lowry Jones to provide medical care to claimant's right and left lower extremities. As no additional evidence was presented, the ALJ did not re-decide the written claim issue. Instead, the ALJ followed the undersigned Board Member's determination that the written claim claimant gave to respondent was timely.

The record on appeal is the same as that considered by the ALJ and consists of the transcripts of the January 15, 2008, Preliminary Hearing and the July 17, 2007, Preliminary Hearing and exhibits, together with the pleadings contained in the administrative file.

### ISSUES

Claimant requests review of the ALJ's finding that he suffered a single accident on August 14, 2002, and no injuries by accidents thereafter. Claimant asserts that he suffered a series of injuries beginning August 14, 2002, and continuing each and every day thereafter through November 12, 2006. Claimant requests that the other findings of the ALJ be affirmed as being consistent with the evidence.

Respondent argues these workers compensation claims should be denied due to claimant's failure to make a timely written claim.

The issues for the Board's review are:

(1) Is the issue of single date of accident versus a series of accidents an issue that the Board has jurisdiction to review on appeal from a preliminary order? If so, did claimant

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<sup>1</sup> *Armenta v. Alex Masson, Inc.*, Nos. 1,032,311 and 1,032,312, 2007 WL 3348540 (Kan. WCAB Oct. 11, 2007).

suffer a compensable injury as a result of a single accident on August 14, 2002, or did he suffer a series of accidents beginning August 14, 2002, and continuing each and every day thereafter through November 12, 2006?

(2) Is respondent able to seek review of the issue of timely written claim for compensation when this issue was not raised at the January 15, 2008, preliminary hearing and when the ALJ did not make a finding on this issue in his January 16, 2008, Order? If so, did claimant make a timely written claim for compensation?

#### **FINDINGS OF FACT**

No new evidence was presented at the January 15, 2008, preliminary hearing. Therefore, the findings of fact set out in the Order entered by this Board Member on October 11, 2007, are incorporated herein as though set out in full.

The January 15, 2008, preliminary hearing was held on claimant's request for medical care based on this Board Member's Order finding that claimant had made a timely written claim for compensation. Further, respondent requested the ALJ make a determination of whether claimant sustained a single accident or a series of accidents. The ALJ was not asked to reconsider whether claimant had made a timely written claim and, as stated above, no further evidence on this issue was presented and no new determination was made.

Since the ALJ did not make a finding in his January 16, 2008, Order that claimant had made a timely written claim, it appears from the brief filed by respondent that it is asking the Board to reconsider its Order of October 11, 2007.

#### **PRINCIPLES OF LAW**

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.<sup>2</sup> This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>3</sup>

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<sup>2</sup> K.S.A. 2007 Supp. 44-551(i)(2)(A).

<sup>3</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, Syl. ¶ 3, 994 P.2d 641 (1999).

K.S.A. 2007 Supp. 44-551(i)(2)(A) states:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

K.S.A. 2007 Supp. 44-555c(a) states in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>4</sup> Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.<sup>5</sup>

### **ANALYSIS**

The parties agreed at the January 15, 2008, preliminary hearing that the only issues for the ALJ's determination were whether claimant was in need of medical treatment and the date or dates of accident, specifically whether claimant suffered a single accident or a series. Date of accident is not an issue that the Board has jurisdiction to review on an appeal from a preliminary hearing order unless a determination of accident date or dates is necessary in order to determine a jurisdictional issue such as whether notice or written claim was timely made. The parties did not request that the ALJ decide the issue of timely written claim at the preliminary hearing on January 15, 2008, and that issue was not

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<sup>4</sup> K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, rev. denied 271 Kan. 1035 (2001).

<sup>5</sup> K.S.A. 2007 Supp. 44-555c(k).

decided by the ALJ in his January 16, 2008, Order. Therefore, the Board is without jurisdiction to review the written claim issue in this appeal. As such, the Board is without jurisdiction to review the ALJ's determination of claimant's accident date.

**CONCLUSION**

Because no issue has been raised which the Board has jurisdiction to review at this stage of the proceedings, this appeal must be dismissed.

**ORDER**

**WHEREFORE**, it is the finding, decision and order of this Board Member that this appeal from the Order of Administrative Law Judge Steven J. Howard dated January 16, 2008, is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2008.

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HONORABLE DUNCAN A. WHITTIER  
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant  
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge